Supreme Court of the United States

October Term 1959

No. 361

JOSEPH M. BRENNAN

v.

W. A. WELLS, LTD., W. A. WELLS HERMAN SHEET, WILLIAM GREENBERG, HERBERT E. ROBISON, SEEKEL WRECKING CO., ROCK WOOL INSULATING COMPANY, [illegible] INVESTMENT COMPANY, [illegible]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Supreme Court of the United States

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No. ——

JOSEPH M. BRENNAN,

Petitioner,

vs.

W. A. WILLS, LTD.; W. A. WILLS; HERMAN SPEKEN; WILLIAM GREENBERG; HERBERT F. KORHOLZ; SPEKEN WRECKING CO.; ROCK WOOL INSULATING COMPANY, a Colorado Corporation; and M. P. M. INVESTMENT COMPANY, a Delaware Corporation,

Repondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on January 5, 1959.

OPINIONS BELOW

The opinion of the District Court for the District of Colorado is reported in the Transcript of Record to the Court of Appeals (Fols. 116 & 126, pp. 29, 30, 38 & 39),

and a certified copy thereof is appended to this petition. The opinion of the Court of Appeals for the Tenth Circuit is reported at 263 F. 2d 1.

(The Exhibits, folios and pages referred to in the Transcript of Record from the District Court are indicated as: TR., Ex. ". . ", fol. . . , pp. . . References to the Transcript from the Court of Appeals are indicated as: R. CCA, pp. . .. References to Petitioner's Brief to the Court of Appeals are indicated as: R. CCA-Brief, pp. . .)

JURISDICTION

The judgment of the Court of Appeals was made and entered on January 5, 1959 (R. pp. 3-13), and a certified copy thereof is appended to this petition. Denial of petition for rehearing was made and entered by the Court of Appeals on February 6, 1959 (R. p. 17). The jurisdiction of this Court is invoked under Title 28 USC 1254(1) and Rule 21 of Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Introductory statement: All right, title and interest in and to Certificate of Stock No. 46 in Rock Wool Insulating Company, a Colorado corporation, was sold, assigned and transferred to petitioner by an instrument in writing as duly executed by and delivered to petitioner by the registered owner of Certificate of Stock No. 46. The transaction was consummated without delivery of Certificate of Stock No. 46, as delivery of said certificate was made impossible by respondents' retention thereof and refusal to surrender same and refusal to accept tender to release said certificate from its pledged status.

Petitioner's Replevin action was filed in the District

Court on September 19, 1954, the complaint was amended three times incident to a series of motions as filed by respondents. The Third Amended Complaint was dismissed on the pleadings by the District Court on October 31, 1957, and its judgment rendered and entered was: "That plaintiff had no title to the certificate of stock which he seeks to replevin * * * and fails to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to plaintiff." (TR. fol. 116, p. 29). The Court of Appeals affirmed. The questions presented are:

1(a) Whether petitioner acquired all right, title and interest in and to Certificate of Stock No. 46 in Rock Wool Insulating Company, when its registered owner delivered to petitioner a duly executed instrument of sale, assignment and transfer of all right, title and interest in and to Certificate of Stock No. 46 in consummation of the transaction, and when manual delivery of Certificate of Stock No. 46 was made impossible of delivery to petitioner, by respondents' retention thereof, refusal of its surrender and refusal to accept tender to release it from its pledged status.

(b) Whether said transaction by and between petitioner and the registered owner of Certificate of Stock No. 46 constituted an executed contract for the sale, assignment and transfer of all right, title and interest in and to said Certificate, or, as the Court of Appeals ruled, that it merely constituted a promise to transfer the stock.

2(a) Whether petitioner was denied his right of a trial before a jury on the merits of his action in replevin, when he pleaded in accordance with the applicable statute, viz. his ownership of Certificate of Stock No. 46, his

right to its immediate possession, and its wrongful retention by respondents, which allegations were admitted to be true when the action was dismissed on the pleadings, and wherein a question of ultimate fact was involved and not one of law.

(b) Whether the District Court and the Court of Appeals were required to be governed by statutory law of the State of Colorado, as prescribed by C.R.C.P., Rule 104-Replevin, and the decisions of the Supreme Court of the State of Colorado construing said statute and Rule 104.

(c) Whether legal title to the intangible corporate stock evidenced by Certificate of Stock No. 46, was an issue in petitioner's replevin action, when recovery of the personal property, viz, Certificate of Stock No. 46, the muniment or evidence of ownership was the personal property sought to be recovered in petitioner's replevin action.

3. Whether the dismissal of petitioner's action in replevin under the circumstances stated in questions 2(a), (b), (c) above, by the District Court and the affirmance thereof by the Court of Appeals has so far departed from the usual and accepted course of judicial procedure as to call for an exercise of this court's power of supervision.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Revised Statutes of the State of Colorado are set forth in petitioner's Brief to the Court of Appeals appended hereto on the referenced pages: Chap. 31, Art 2, Secs. 8 and 14 at page 9; Chap. 31, Art. 2, Secs. 1, 3, 4, 5 and 6 at pages 10-11; Colorado Rules of Civil Procedure, Rule 104 at pages 6-7; Title 28 U. S. C. A.,

Secs. 1652 and 1254 (1) and Rules 19, 21 and 23 of the Supreme Court of the United States. F. R. C. P., Rules 9, 12, 19(b), 33, 34, 35 and 38.

STATEMENT

Earl Melia was the registered owner of Certificate of Stock No. 46 representing ownership of fifty shares of Capital Stock in Rock Wool Insulating Company, a Colorado Corporation (TR. Ex. "A", fol. 106, p. 21). In September 1952, Melia obtained a loan of $1,200.00 from W. A. Wills, Ltd., which involved a loan contract between Melia and Wills, Ltd.; Melia's promissory note of $1,200.00 to Wills, Ltd., at an interest rate of six per cent per month; and, Melia's pledging with Wills, Ltd. Certificate of Stock No. 46 as security for said loan (TR. Exs. "B" & "C", fol. 106, pp. 21-22). Subsequently, respondent W. A. Wills, Ltd. in concert with the other respondents carried on a series of secret manipulations affecting said loan contract, promissory note and the pledged Certificate of Stock No. 46 without any knowledge thereof by Melia, eventually respondent Speken told Melia, that he had Certificate of Stock No. 46 in his office safe and that he would carry said loan indefinitely at eight per cent per annum, and which interest rate Speken later on affirmatively stated was at six per cent per annum. However, Melia paid all interest on said loan to Speken currently at eight per cent per annum (TR. Ex. "D", fol. 106, p. 22).

On August 13, 1954, Melia sold, assigned and transferred all right, title and interest in and to Certificate of Stock No. 46 to petitioner (TR. Ex. "E", fol. 107, pp. 22-23), and of said transaction by and between Melia and petitioner, each of the respondents were duly and promptly notified by petitioner's registered letter (TR. Ex. "F", fol. 108, pp.

24, 25). Respondents at all times refused to accept tender of repayment of said loan and refused all demands for the return of Certificate of Stock No. 46 to either said Melia or petitioner (TR., fols. 100 to 103, pp. 16-18).

On September 19, 1954, petitioner filed his complaint in replevin in the District Court naming each of respondents as defendants, except Rock Wool Insulating Company and M. P. M. Investment Co. Subsequently, an amended complaint was filed which specified the amount involved, and the damages and compensation prayed for in the event Certificate of Stock No. 46 was not delivered into petitioner's possession, and respondents' motion to dismiss the amended complaint was overruled and respondents filed their answer thereto. A second amended complaint was filed without any material change in the pleadings, except an expansion of the allegations of fraud so as to conform to the particularity required by F.R.C.P., Rule 9. A subsequent motion of respondents to dismiss for failure to state a cause of action was sustained, and the court on its own motion granted petitioner leave to file a third amended complaint to include additional party defendants, and the third amended complaint as filed added Rock Wool Insulating Company and M. P. M. Investment Co. as additional defendants (TR. fol. 94, p. 11). Respondents' motion to dismiss the Third Amended Complaint (TR. fol. 109, p. 26) was sustained, and judgment rendered and entered without acting on petitioner's Motion for Order to Issue Summons for service on additional party defendants (TR. fol. 113, p. 27). Subsequent proceedings in the District Court were confused and irregular (TR. fols. 113 to 126, pp. 27 to 39).

The judgment of the District Court (TR. fols. 116 & 126, pp. 29 & 38) as rendered and entered, was in pertinent

part: "That plaintiff has no title to the certificate of stock he seeks to replevin in that the Third Amended Complaint fails to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to the plaintiff." The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

The decision below should be reversed for the reasons: (1) It erroneously interprets and misapplies the legislative intent and purpose of the pertinent statutes of the State of Colorado, and the decisions of the Supreme Court of the State of Colorado construing the provisions of those statutes; (2) it encroaches upon a legislative zone reserved for the legislature, and tends to establish law by non-adherence to the statutory intent and provisions; (3) it dismissed the action in replevin on the pleadings which were admitted to be true and sufficient in statutory scope and detail as prescribed by the legislature for petitioner's guidance and protection; (4) it denied petitioner a trial before a jury on the merits of the issue; (5) it failed to follow pertinent decisions of the Supreme Court of the State of Colorado, the Court of Appeals for the Tenth Circuit, or pertinent decisions of other Courts of Appeals, or the Supreme Court of the United States; and, (6) an important question of law is involved widely general in its nature and affects in the commercial world which would by such decision cause serious confusion concerning the sale, assignment and transfer of right, title and interest to Certificates of Stock, warehouse receipts, patents and other property evidenced by written instruments.

I.

1(a) The allegations in petitioner's Third Amended Complaint were greatly expanded from the original and those statutorily required by reason of respondents' series of motions, however, petitioner's action is closely similar to the issue in the case of *U. S. v. Butt*, 1953, 10 Cir., 203 F. 2d 643. In both cases the assignee brought suit in his own name, and in both cases there was attached to the complaint a copy of a promissory note, a copy of the mortgage or contract of pledge and a copy of the assignment from the mortgagor or pledgor, and wherein the Court held that, the assignment conveyed to the United States all the right, title and interest in the property and to any claim which the mortgagor or pledgor might have, and that an assignee may maintain an action on the assignment, citing 4 Am. Jur., Assignments, Sec. 34; 6 C. J. S., Assignments, Sec. 34; *Tome v. Dubois*, 1866, 6 Wall. 548, 73 U. S. 548, 18 L. Ed. 943; *Cook v. Ball*, 7 Cir., 144 F. 2d 423, 439; 42 A. L. R. 128, and other cases. The *Tome v. Dubois* case, supra, in pertinent part is recited in petitioner's Brief (TR. CCA-Brief) at pages 15-17, and at pages 19-24 significant cases are cited which concern ownership conveyed to an assignee of a Certificate of Stock, viz: *Black v. Zacharie*, 1845, 11 L. Ed. (3 How.) 690; *Hatch v. Std. Oil Co.*, 1879, 100 U. S. 124, 31, 25 L. Ed. (10 Otto) 554, 5; *Leonard v. Davis*, 1861, 17 L. Ed. (1 Black) 222, 5; *Slaughter v. Glenn*, 1878, 98 U. S. 242, 5, 25 L. Ed. 122, 3; *Talty v. Freedman's Trust Co.*, 1876, 93 U. S. 321, 23 L. Ed. 886, 7; *Helvering, Comr. I. R. v. Kaufman*, 1943, 4 Cir., 136 F. 2d 356, 8.

(b) An executed contract of sale, assignment and transfer of Certificate of Stock No. 46 was consummated by the registered owner thereof to petitioner by symbolical delivery of the Certificate of Stock No. 46 when manu-

al delivery thereof was not possible. As the court said in *Tome v. Dubois*, supra, at page 946 "Delivery is not essential, as it is well settled that when the terms of the sale are agreed upon, and the bargain struck, and everything the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery * * *." See also *Anderson v. Courtney*, 1950, 218 P. 2d 361, 4; *U. S. v. S. F. Elec. Ass'n.*, 57 F. S. 57, 67; Bowles v. Jung, 57 F. S. 701, 7; *Pac. Coop. v. U. S.*, 91 F. S. 572, 3; *Am. Surety Co. v. Baker*, 4 Cir., 172 F. 2d 689, 92, *Slaughter v. Glenn*, supra; *Crump v. Hill*, 105 F. 2d 124, 6; *In re Spain's Estate*, 46 N. Y. S. 2d 789, 91; *Livingston v. Powell*, 50 So. 2d 521, 5; *In re Millard's Estate*, 77 Pa. D & S 97; *Winslow v. Fletcher*, 4 A. 250, 5; In *Miller v. Hospelhorn*, 4 A. 2d 728, 33; In *Lyons v. Freshman*, 226 P. 2d 775, 7, citing *Richardson v. Int. Rev.*, 126 F. 2d 562; 140 A. L. R. 705 and *U. S. v. Rosebush*, 45 F. S. 664. In *Helvering, Comr. I. R. v. Kaufmann*, 4 Cir., 1943, 136 F. 2d 356, 8, the court said:

> "* * * It does not seem to be denied that stock certificates are only evidence of ownership, and that failure to deliver possession of the certificates does not of itself prevent passing of title to the stock from an owner to an assignee, if such is the intention of the parties."

(c) The decisions of the above cited authorities extending over the past 150 years, have clearly and consistently ruled: (1) That registration of stock transfers on the corporation's books is solely for the protection of the corporation and third parties taking transfers without notice of any prior equitable transfer; (2) That a duly executed sale, assignment and transfer of stock ownership by the registered owner conveys absolute ownership to the assignee and a valid title; (3) That a symbolical or con-

structive delivery of the Certificate of stock suffices, when actual delivery thereof is impossible or impracticable. RECOVERY OF PERSONAL PROPERTY WRONGFULLY WITHHELD IS THE BASIS OF C. R. C. P., RULE 104-REPLEVIN, PROVIDING:

A. That an assignee of a Certificate of Stock has a right to recover in an action in replevin possession thereof, and is at all times possessed of all redemption rights, and,

B. That neither the Uniform Stock Transfer Act nor any incorporation thereof in the statutes of the State of Colorado, C. R. S. Chap. 31, Art. 9, Secs. 1 to 9 inc., requires an assignee of a Certificate of Stock to register a transfer thereof on the corporation's books, nor does said Rule 104-Replevin nullify its basic purpose, requiring action plainly impossible of performance, when the property is wrongfully retained.

II.

2(a) Under the statutory corporation law of the State of Colorado, any registered owner of a Certificate of Stock retains ownership when the certificate of stock is pledged: C. R. S. Chap. 31, Art. 2, Sec. 14 (TR. CCA-Brief, pp. 9-10), and such owner is empowered to sell, assign and transfer such ownership. In *Reeves v. Stokel*, 1949, 120 Colo. 82, 208 P. 2d 94, a replevin action in which the Supreme Court of the State of Colorado in construing the statute: C. R. S. and C. R. C. P., Rule 104-Replevin (TR. CCA-Brief, pp. 6-7) held: That the pledgor held title which would pass to the purchaser, or assignee, and that when such a special interest in the property existed in a party he was entitled to its possession, thus meeting the requirements of C. R. C. P., Rule 104-Replevin. That decision was cited with approval by the same Court in

Gross v. Dreiling, 127 Colo. 420, 257 P. 2d 402, 3. In *McLeod v. Fourth Nat'l. Bk. of St. Louis*, 122 U. S. 528, 33, 30 L. Ed. 1237, the Court held: The real ownership of the property always remained in the pledgor who could sell it at any time. "The pledgee acquired no interest in the property except an interest for the debt, *and even where the legal title to incorporeal property, such as corporation stock is transferred to a pledgee as collateral security he takes only a special property therein. The general property remains in the pledgor after as well as before the default.*" (emphasis supplied). To the same effect in *Talty v. Freedman's Sav. & Trust Co.*, supra, and *In Re Rogers*, 20 F. S. 132. It is universally established that the pledgor retains ownership of the property, and that the pledgor can sell all right, title and interest therein at any time. In *Miller v. Wahyou*, 1956, 9 Cir., 235 F. 2d 612, 5, the court held: That a pledgor of corporate stock retained full title to the stock subject to lien and that there was no merit in the contention that the pledgor did not have an interest in the pledged shares to assign.

(b) Petitioner had proper right to maintain his replevin action whether his title was absolute, fiduciary, conditional, or qualified. In *Shipton v. Norrid*, 1872, 1 Colo. 404, the court said: "It is sufficient to aver the fact of his property and the injury * * * the property is admitted by the demurrer, and the declaration is clearly sufficient." The same Court in *Illinois Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 3, 96 P. 177, said: "A complaint in replevin under the code which alleges that plaintiff is the owner, sufficiently answers the requirement that plaintiff is entitled to possession of the property. It is settled in this State, and seems to be the rule elsewhere that a general allegation of ownership is sufficient." To the same effect,

in *Hanauver v. Bartels*, 2 Colo. 514, 23; *Benesch v. Waggoner*, 12 Colo. 534, 21 P. 706; *Webster v. Kautz*, 22 Colo. App. 111, 17, 123 P. 139; *St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 P. 199, 201; *Clay v. Martinez*, 74 Colo. 10, 13, 218 P. 903; *Harrison v. City of Denver*, 102 Colo. 98, 103, 76 P. 2d 110, 12; *Reeves v. Stokel*, 120 Colo. 82, 208 P. 2d 94; *Gross v. Dreiling*, 127 Colo. 420, 257 P. 2d 402; *Somerville Bk. v. Hornblower*, 1936, Mass., 119 N. E. 918; *In re Rogers*, 20 F. S. 120; *U. S. v. Rosebush*, 45 F. S. 664; *McLeod v. Fourth Nat. Bk. of St. Louis*, 122 U. S. 528, 33, 30 L. Ed. 1237; *Williams v. Williams*, 274 P. 2d 359, 62; *Baron v. Peoples Nat. Bk. of Secaucus*, 84 A. 2d 492, 3; *Journeymen Barbers v. Pollino*, 120 A. 2d 767, 73; Restatement-Trusts, Sec. 2, comment (d):-Title and ownership.

In *Blackner v. Blackner*, 87 Colo. 483, 289 P. 366, 7, replevin action to recover certificates of stock, the Supreme Court of the State of Colorado said: "The complaint alleged plaintiff's ownership and right to possession and unlawful detention by defendant. * * * These allegations state a cause of action * * * and the demurrer to it was properly overruled." In *Denver Onyx Co. v. Reynolds*, 1895, 10 Cir., 72 F. 464, the Court recited the history of the law pertaining to actions in replevin in the State of Colorado, and pleadings therein which the court said were plain and simple. Significantly, no change has been made therein by the legislature to the present time. The Court further holding: That under the code of the State of Colorado an action in replevin may be maintained in all cases where the plaintiff is the owner of the property, or ENTITLED to possession thereof, and that under the code the action for recovery of personal property lies, by one entitled to possession, against one wrongfully holding the possession. To the same effect, in *Baron v. Peoples Nat. Bk. of Secaucus*, 84 A. 2d 492, 3, the court said: " 'Replevin,

or equitable replevin may be maintained for a certificate of stock where the object is to *regain possession of the specific paper and NOT TO TEST THE RIGHT TO THE PROPERTY WHICH IT REPRESENTS*' (emphasis supplied) 46 Am. Jur. 22, page 15. Also, 'A certificate of stock, that is, the certificate itself as distinguished from the stock which it represents, is undoubtedly property; * * * and it has a primary value separate and distinct from the value of the shares it represents. * * * And if it is wrongfully detained from the true owner, or wrongfully converted by another, it may be recovered in an action of detinue or replevin * * *' 11 Fletcher, Cyclopedia of Corporations (Perm. Ed.) 62, par. 5097, citing cases."

III.

3. A Certificate of Stock under the statutes of the State of Colorado, its corporation laws and its larceny act, provide: (a) That the Certificate of Stock itself is personal property; (b) that the certificate itself has intrinsic value and separate and distinct from the intangible corporate stock which it represents; (c) that the assignee of all right, title and interest in and to the Certificate is the absolute owner thereof; (d) that when the certificate is wrongfully retained from the assignee, he has a right of recovery thereof by an action in replevin under C. R. S., C. R. C. P., Rule 104-Replevin; (e) that such assignee out of possession of the certificate, need only plead under said Rule 104, that he is the owner of the certificate, that he has a right to its immediate possession, and that it is wrongfully withheld from him. The Supreme Court of the State of Colorado has consistently construed said statutory pleadings under said Rule 104 as sufficient to state a cause of action replevin for the recovery of personal property out possession, for recovery of compensatory dam-

ages for its wrongful detention, and for payment of the value of the property should its delivery not be possible.

There is no statute of the State of Colorado, nor any decision of its Supreme Court, that requires an assignee of a Certificate of Stock to surrender same to the issuing corporation for cancellation and transfer thereof on its books. The sole purpose and intent of the Stock Transfer Act is to provide a uniform means of effecting a recordation of transfer of title to the intangible corporate stock as represented by the Certificate of Stock, provided, the owner or assignee of the certificate voluntarily elects so to do, at any time during his tenure of ownership of the Certificate of Stock, anything to the contrary notwithstanding. It cannot be said that conveyance of all right, title and interest in and to a Certificate of Stock, and the acquirement of absolute ownership of the specified personal property, viz, the Certificate of Stock, by a duly executed sale, assignment and transfer thereof to the purchaser or assignee by its registered owner, conveys nothing, unless or until the Certificate of Stock is surrendered for cancellation and transfer on the corporation's books. Nor can it be said that a condition precedent remains unfulfilled by the failure of an assignee to effect said record transfer, and, even if such action was a requisite to convey ownership of the Certificate of Stock to the assignee, when such transfer was made impossible of performance by wrongful retention of the Certificate of Stock, the assignee would have a right to first recover the Certificate, so that, such condition precedent could be made possible of performance. In *Stearns v. U. S.*, 291 U. S. 54, 61, 78 L. Ed. 647, 53; the court said: "He who prevents a thing from being done may not avail himself of the non-performance which he himself has occasioned, for the law says to him in effect 'this is

your own act, and therefore you are not damnified (citations).'"

The court below was required to follow the principles of law as laid down by this Court, to apply the statutory law of the State of Colorado and to follow the interpretations thereof as made by the Supreme Court of the State of Colorado.

In *Mullane v. Cent. Hanover Tr. Co.*, 339 U. S. 306, 14, the court said: "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordeau, 234 U. S. 384, 394."

In *Woods v. Klobuchar*, 1958, 7 Cir., 257 F. 2d 313, 5, the court said: "It is well established that a federal court adjudicating a state created right solely because of diversity of citizenship is, in effect, only another state court and cannot substantially affect the enforcement of a right given by the State; that Congress has afforded out-of-state litigants another tribunal but not another body of law." In *U. S. v. Am. Nat. Bk. of Jacksonville*, 1958, 8 Cir., 255 F. 2d 504, 6, the court said: "* * * the rules of property and the fixing of incidents of property ownership are rules of state law which federal courts will respect. Poe v. Seaborn, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239." In *Harris v. Egger*, 1915, 6 Cir., 226 F. 389, 95, the court held: That the statutory rule of the State would be recognized, and enforced in federal courts (numerous citations) The court further held: That the title to the stock passes and becomes complete in the purchaser upon the assignment of the certificate without registration or transfer on the stock book of the corporation (numerous citations), and that where ordinary personal property is distinctly identified and sold, and the purchase price paid, title passes without delivery.

Under the F. R. C. P., Rule 12, the court held in *Olan v. Enterprise*, 1954, 5 Cir., 210 F. 2d 895, 97, that a motion to dismiss admits all the well pleaded allegations of the complaint, that replecation thereto must be made by answer, since pleas are abolished under the federal rules of civil procedure, and that there may be an issue for the jury on the subject together with other issues. Such matters belong to a trial before the court and a jury, not by a motion to dismiss which admits so much. To the same effect in *Stanton v. Larsh*, 1956, 5 Cir., 239 F. 2d 104, 6; *Dotschay v. Nat. Mut. Ins. Co.*, 1957, 5 Cir., 246 F. 2d 221, 3; *Ryan v. Scoggin*, 1957, 10 Cir., 246 F. 2d 54, 57; *Carass v. Outboard Marine Corp.*, 1958, 5 Cir., 252 F. 2d 690; *Polk v. Glover*, 305 U. S. 5, 6, 83 L. Ed. 6; *Dietrick v. Greany*, 309 U. S. 190, 6, 84 L. Ed. 694; *Hardware Mut. Ins. Co. v. Snyder*, 3 Cir., 137 F. S. 812, 3. Petitioner's action was dismissed on the pleadings, and upon the erroneous theory that he had not complied with the Stock Transfer statute of the State of Colorado, which in all respects represents an adaptation of the Uniform Stock Transfer Act. The unwarranted nature of such opinion as a basis of dismissal, particularly when any such action on the part of petitioner was unnecessary, and otherwise made impossible of performance, is exemplified by the Supreme Court of the State of Indiana in the case of *Fardy v. Mayerstein*, 47 N. E. 2d 315, wherein the court said at page 317:

> "(2) Ordinarily, because of the fiduciary relationship created by the pledge, a pledgee may not purchase the subject of the pledge at his own sale. 41 Am. Jur. Pledge and Collateral Security, § 90, and notes in A. L. R. therein cited. The same text, § 93, states that 'the provisions in a pledge agreement authorizing the pledgee to purchase the property will be strictly construed, being in derogation of the common law. * * *'"

and at page 318:

"(9-12) As between the parties the Uniform Stock Transfer Act, Burns' Ann. St. § 25-701 et seq., does not make an owner out of a pledgee against the express terms of a written contract between them. If there were any case so holding we should expect to find it among cases cited in Vol. 6 of the Uniform Laws Annotated. While there are numerous statements in the cases therein cited which pieced together might afford argument for such result, we find no decision squarely in point. The purpose of the statute was not, primarily at least, to determine ownership but to make uniform in the states the method of transferring title where such transfer is necessary to carry into effect contracts for disposition of stock. * * * It is sufficient here to say that where there is an express contract by the owner of record creating a pledge to secure his debt, the other party to the contract becomes a pledgee with, as the cases say, a lien upon the stock. One does not have a lien upon his own property. He may convert the lien into ownership by foreclosure. His unsuccessful attempt so to do in this case left him with the status of pledgee."

Petitioner in his action in replevin sought possession of Certificate of Stock No. 46, the personal property as duly sold and assigned to him, and wherein he acquired absolute title to that specified Certificate of Stock No. 46. No matter concerning the recording of Certificate of Stock No. 46 on the books of the corporation was in issue in petitioner's replevin action. Noteworthy, is the fact that the District Court had denied petitioner's motion under the Discovery process, F. R. C. P., Rules 33 & 34, denied his motion for issuance of summons to new party defendants, under F. R. C. P., Rule 19(b), and denied his duly filed demand for a trial before a jury, under F. R. C. P., Rule 38. In the case of *Societe Internationale v. Rogers*, 1958, 357 U. S. 197, 2 L. Ed. 2d 255, 65, 78 S. Ct.

1087, the court said: "* * * that no person shall be deprived of property without due process of law * * * there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording the opportunity for a hearing on the merits of his cause." It is well settled that, where reasonable minds might draw different conclusions, that a question of fact is presented requiring determination by a jury. A glaring example of such a situation concerning a question of fact, or a mixed question of fact and law, is illustrated in the majority opinion of the Court of Appeals, compared with the dissenting opinion as rendered and entered in petitioner's action in replevin, and in contrast and conflict with prior decisions, e.g., the Colorado cases of *Denver Onyx v. Reynolds*, *Blackner v. Blackner*, supra, and other citations above, which cases, as petitioner's, were distinctively possessory actions for recovery of personal property.

CONCLUSION

The nature and effect of the issue involved in this case is of far reaching importance, and of great public interest in the uses and customs of transfers and assignments of Certificates of Stock and similar commercial paper, and wherein grave constitutional questions are involved, and which issue has not heretofore been directly decided and settled by this Court. For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH M. BRENNAN,
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APPENDIX

OPINION

(January 5, 1959)

Joseph M. Brennan, pro se.

V. G. Seavy (Seavy and Seavy was with him on the brief) for appellees.

Before Bratton, Chief Judge, and Huxman and Lewis, Circuit Judges.

BRATTON, *Chief Judge:*

Joseph M. Brennan instituted this action in replevin to recover possession of fifty shares of corporate stock issued by Rock Wool Insulating Company to Earl P. Melia. In the third amended complaint Rock Wool Insulating Company, W. A. Wills, Ltd., Speken Wrecking Co., M. P. M. Investment Company, W. A. Wills, Herman Speken, William Greenberg, and Herbert F. Korholz, were joined as defendants. While not pleaded in conventional manner, it is fairly apparent from the face of the pleading considered as a whole that jurisdiction of the action was predicated upon diversity of citizenship with the requisite amount in controversy. It was pleaded that plaintiff acquired his right to the stock by assignment from Melia. Judgment was entered dismissing the action upon the ground that the third amended complaint failed to show compliance with the statutes of Colorado necessary to transfer to plaintiff title to the shares of stock and that plaintiff had no title thereto.

It is the general rule in Colorado that replevin is a possessory action in which plaintiff must rely upon his own title or right of possession and not upon any defect or weakness in the position of the defendant respecting title

or right of possession. Hall v. Johnson, 21 Colo. 414, 42 Pac. 660; Kelly v. Lewis, 38 Colo. 18, 88 Pac. 388; Illinois Building Co. v. Patterson, 91 Colo. 391, 15 Pac. (2d) 698; Barslund v. Anderson, 106 Colo. 238, 103 Pac. (2d) 23. And the controlling issue in replevin is the right to immediate possession of the property at the time of the institution of the action. Brown v. Driverless Car Co., 86 Colo. 216, 280 Pac. 488.

It is provided by statute in Colorado, C. R. S. 1953, 31-9-1, that title to a certificate and to the shares of stock represented thereby can be transferred only by delivery of the certificate endorsed either in blank or to a specified person by the person appearing in the certificate to be the owner of such stock, or by delivery of the certificate and a separate written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. And it is further provided by statute in that state, C. R. S. 1953, 31-9-10, that an attempted transfer of title to a certificate of stock or to the shares represented thereby without delivery of such certificate shall have the effect of a promise to transfer; and that the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. When these statutes are considered together, it is clear that in Colorado legal title to shares of stock issued by a corporation organized under the law of that state can be effectively transferred in only one or the other of two methods. One method is by delivery of the certificate with an endorsement thereon in blank or to a specified person, signed by the person appearing in the certificate to be the owner thereof. The other is by delivery of the certificate and a separate document con-

taining a written assignment or a power of attorney to sell, assign, or transfer the same, signed by the person appearing in the certificate to be the owner of the stock. These methods are exclusive, and any attempt to transfer stock without delivery of the certificate does not have the effect of passing title but merely constitutes a promise to transfer. Johnson v. Johnson, 300 Mass. 24, 13 N. E. (2d) 788; Knight v. Shutz, 141 Ohio St. 267, 47 N. E. (2d) 886; Manna v. Pirozzi, 44 N. J. Super. 227, 130 Atl. (2d) 55; Hardy v. Musicraft Records, 98 Cal. App. (2d) 698, 209 Pac. (2d) 839.

Manifestly drawn without the aid of an attorney, the third amended complaint contained many allegations not ordinarily found in the complaint in a conventional action to replevin stock. Certain allegations were contained in the pleading respecting the relationship of employer and employee existing between the defendant Rock Wool Insulating Company and Melia; respecting coercive methods used to compel Melia to absent himself from a certain meeting of the directors of the defendant Rock Wool Insulating Company; respecting coercive methods employed to compel Melia to execute and deliver his resignation as director of such corporation; respecting fraudulent methods and means through which the defendant Korholz obtained control of the defendant Rock Wool Insulating Company and mismanaged its affairs; and respecting the fraudulent exploitation of the assets and earnings of the defendant Rock Wool Insulating Company. Stripped of all allegations of such nature, it was pleaded that certificate No. 46 for fifty shares of capital stock of the defendant Rock Wool Insulating Company was issued to Melia; that Melia and his wife obtained a loan of $1200 from the defendant W. A. Wills, Ltd., and pledged the stock as security therefor; that the stock was pledged without any

right or grant from Melia to any of the defendants to transfer title to any other party or parties on the books of the corporation; that Melia offered to repay to the defendant W. A. Wills, Ltd., the loan of $1200 with accrued interest; that Melia was advised that the stock had been transferred to the defendant Korholz; that the defendant Korholz advised Melia that the stock had been delivered to the defendant Speken; that the defendant Speken advised Melia that he would carry the loan indefinitely if the interest were paid as it accrued for each period of six months; that thereupon Melia paid to the defendant Speken the interest due for the first six months, and continued to pay such interest thereafter; that on a certain date Melia tendered $1200 in cash to the defendant Speken and demanded delivery of the stock; that Speken refused to accept the tender; that Melia mailed to the defendant Speken a check for $1224 bearing the inscription "Payment in full for loan of my $1,200.00 on pledged stock certificate No. 46 registered in my name * * *"; and that such check was received and remained in the possession of the defendant Speken. It was further pleaded that Melia and his wife, sold, assigned, and transferred the stock to plaintiff by means of a separate instrument in writing not endorsed upon or attached to the certficate; and that such stock was not delivered to plaintiff for the reason that some of the defendants—the one or ones not being known to plaintiff—possessed and retained it. And it was further pleaded that plaintiff advised the defendants by registered mail of the sale and assignment of the stock to him and demanded that a time and place be designated at which he could tender and make payment of the loan and have the stock delivered to him; that the defendants failed, neglected, and refused to make reply to such notice and demand; that plaintiff notified the defendants that the sum of $1200 was being

held by the collection department of a named bank in Denver, Colorado, with directions to pay it to the party who should make delivery and surrender of the stock to the bank; that plaintiff had always been ready, able, and willing to repay the loan; and that plaintiff "now brings said tender into court ready to be paid to said defendant * * *". The assignment from Melia and wife to appellant without delivery of the certificate did not have the effect of vesting in appellant title or ownership of the shares of stock. It merely constituted a promise to transfer the stock; and the obligation, if any, imposed by such promise is to be determined by the law governing the formation and performance of contracts. But this is not an action between appellant and Melia and his wife for the enforcement as between them of rights under such an obligation. It is an action in replevin to obtain the immediate possession of the stock from the party or parties appellee who holds or hold it as a pledge for the unpaid note of Melia and his wife. And having nothing more than an obligation to transfer the stock to him, appellant cannot maintain such an action in replevin to obtain its immediate possession.

The judgment is

Affirmed.

Judge Huxman dissenting.

I fail to see where the title to stock or the transfer of title under the Colorado Certificate Stock Transfer Act, set out in the majority opinion, is a factor in this case. This is not a case involving the title or ownership of the 50 shares of stock represented by Certificate Number 46. In his prayer plaintiff prays, "that he have and recover possession of said certificate of stock No. 46." It is true that in addition he prays that "the right and title to said

stock ownership be declared to rest in plaintiff." It is axiomatic that the prayer forms no part of the cause of action and that a plaintiff will be awarded such relief as is warranted by the complaint. Plaintiff was not entitled to have judgment declaring him to be the owner of this stock but if he could establish the allegations of his complaint, set out herein, he was entitled to have judgment for the possession of Stock Certificate Number 46.

This is strictly a replevin action in which the plaintiff seeks to recover a specific piece of paper, to-wit: Stock Certificate Number 46. The complaint is inartistically drawn, but stripped of its verbiage it is clear that plaintiff seeks to recover a specific stock certificate. All that is necessary for him to allege or to establish in order to prevail is that he is entitled to the possession of the stock certificate, that it is unlawfully withheld from him, that demand has been made for its surrender, and that compliance with such demand has been refused, and this the petition does. Thus it is alleged that, "Defendants are now in possession of certificate of stock No. 46, representing ownership of fifty shares of capital stock in Rock Wool Insulating Company, a Colorado corporation. * * * Plaintiff is unable to state which one or ones of said defendants now wrongfully possess and withhold said certificate of stock No. 46, to which plaintiff has the immediate right of possession by virtue of a duly executed assignment of said certificate of stock No. 46 * * *." It alleges that the stock certificiate has been pledged with the defendants and could not be delivered to him "for the reason that some of said defendants, as above alleged, wrongfully and unlawfully possess and forcibly retain same and upon good tender and demand, as herein alleged, have failed and refused to deliver said certificate of stock No. 46 to plaintiff * * * and by such acts and conduct of defendants, and

each of them, plaintiff is unable to obtain possession of such stock certificate No. 46, to which he is lawfully entitled. * * *"

While the authorities hold that the title or ownership of shares of stock represented by a stock certificate may not be raised in a replevin action, they do hold, so far as I can find, without exception, that the right to recover a specific stock certificate is a proper subject for such an action.

46 Am. Jur., Replevin, § 22 states, "Replevin, or equitable replevin, may be maintained for a certificate of stock, where the object is to regain possession of the specific paper, and not to test the right to the property which it represents." In Somerville National Bank v. Hornblower (Mass.) 199 N. E. 918, while the court held that stock in a corporation could not be recovered by replevin, it did hold that a specific stock certificate could be so recovered. The Court said, "Replevin, or equitable replevin, may be maintained for a certificate of stock." In Campbell v. Brooks, 47 So. 545 (Miss.), the court recognized "that a writ of replevin will lie for the recovery either of deeds or certificates of stock, where the object is to regain possession of the specific paper and not to test the right to the property which it represents." In Bush v. Hillman Land Co., 2 Atl. 2d 133 (Del.), the court held that replevin would lie to recover a specific stock certificate.

It may be well that upon a trial of the issue, plaintiff may fail to establish that he is entitled to the possession of this stock certificate but that can only be determined after a trial upon the merits. In my opinion, the complaint stated a cause of action and the trial court erred in dismissing the complaint.

I would REVERSE and REMAND for a trial on the merits.

JUDGMENT

Before Honorable Sam. G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the court that the judgment of the said district court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING

Twenty-third day, January Term, Friday, February 6th, 1959.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.